Supreme Court, U.S.
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No. 93-1323

In The

Supreme Court of the United States

October Term, 1993

KELLY E. DENOOYER,
by next friend ILENE DENOOYER, and ILENE DENOOYER,
Petitioners,

v.

LIVONIA PUBLIC SCHOOLS,
CAROLE SAMPLES, individually and in her official capacity as Assistant Superintendent for Instruction, DR. KENT GAGE, individually and in his capacity as Director of Elementary Education, JANE VAN POPERIN, individually and in her official capacity as Principal of McKinley Elementary School, and JOSEPH MERINELLI, individually and in his official capacity as Superintendent,
Respondents.

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE PETITION WHERE PETITIONERS HAVE NOT: IDENTIFIED ANY IMPORTANT ISSUE OF LAW THAT HAS NOT BEEN ADDRESSED BY THIS COURT'S EXISTING DECISIONS; IDENTIFIED ANY CONFLICT AMONG THE CIRCUITS REGARDING THE ISSUES INVOLVED IN THIS CASE; AND, HAVE NOT DEMONSTRATED THAT THE LOWER COURTS' OPINIONS ARE INCONSISTENT WITH ANY DECISION OF THIS COURT?

II.

WHETHER THE LOWER COURTS CORRECTLY HELD THAT RESPONDENTS HAD NOT VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS TO FREE EXPRESSION BY DECLINING TO COMPEL SECOND GRADE STUDENTS TO WATCH A PROSELYTIZING VIDEOTAPE IN A PUBLIC SCHOOL CLASSROOM DURING INSTRUCTIONAL TIME?

III.

WHETHER THE LOWER COURTS ERRED IN REJECTING THE FOLLOWING ARGUMENTS ADVANCED BY PETITIONERS:

A. Forum Analysis Does Not Apply To An "Insider" Seeking To "Use" Public School Facilities As Opposed To An "Outsider" Seeking "Access" To Public School Facilities;

B. A Public School Classroom Becomes An Open Forum Or Limited Open Forum When A Teacher Permits Students To Participate In A Curriculum Related Communicative Activity;

C. Respondents Engaged In Viewpoint Discrimination By Declining To Compel Second Grade Students To Watch A Proselytizing Videotape In A Public School Classroom During Instructional Time Where It Is

Undisputed That Most Of The Reasons Why Respondents Declined To Show The Videotape Had Nothing To Do With Its Message; And,

D. Whether The Establishment Clause Permits Public Schools To Treat Religion Like Any Other Subject And, If So, Whether The Record Supports Petitioners' Argument That The School District Discriminated Against Religion.

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RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners are Kelly DeNooyer and her mother, Ms. Ilene DeNooyer. Kelly is enrolled as a student in Respondent, Livonia Public Schools' McKinley Elementary School. The other Respondents are Ms. Jane Van-Poperin, the Principal of McKinley Elementary School; Dr. Kent Gage, the School District's Director of Elementary Education; Ms. Carole Samples, the School District's former Assistant Superintendent of Instruction; and, Dr. Joseph Merinelli, the School District's Superintendent. For economy, Respondents will be referred to collectively as the School District.

Petitioners and the School District stipulated that the material facts are undisputed (Respondents' Appendix,

A-9; B-5). Kelly was a second grade student in Ms. Sandra Solomon's class at McKinley Elementary School during the 1990-91 school year. In December 1990, Ms. Solomon initiated a program called "VIP of the Week." The VIP program had been submitted to and approved by McKinley Principal Ms. Jane VanPoperin and was part of the School District's curriculum for elementary students (Respondents' Appendix, I-2, 3). The VIP program involved selecting a student to be "VIP of the Week." The VIP wore a badge and brought in "special belongings" to describe to his or her classmates. The program's purpose was to enhance students' self-confidence by giving them attention and an opportunity to make brief verbal presentations to the class about things that were important to them (Respondents' Appendix, F-2; H-2–H-3; I-2).

The VIP program proceeded without incident until the week of December 10, 1990, when it was Kelly's turn to be the VIP. Kelly chose to share with her classmates a videotape of her singing a song to the congregation of Temple Baptist Church during a worship service. The title of the song was "I came to love you early" and its lyrics stressed the importance of young children accepting Jesus Christ as their personal savior. The song's lyrics, which the District Court found were "proselytizing," were as follows:

> (Verse One)
>
> I felt sometimes I didn't have a story I could share. I wasn't rescued from a past destroyed by dark despair. Oh but, Jesus, I have memories of the times that we've been through and I wouldn't trade one moment of growing up with you.
>
> (Refrain)
>
> I came to love you early; came to know you young. You touched my heart, dear Jesus,

when my life had just begun. I gave you my tomorrows and a childish heart of sin. And you saved me from a lifetime of what I might have been.

(Verse Two)

You filled some days with laughter; you held me when I cried. You said 'child you can do anything;' you helped me when I tried. Now I treasure every memory, and I am sure there couldn't be a child who could have known more love than you gave to me.

(Verse Three)

I remember how you touched me but I can't explain it all. How a choice that is so important can be made by one so small. I just put aside my questions; what you said to do, I've done. And I thank you for the blessing of coming to you young.

Kelly testified that she wanted to share the videotape with her classmates because it was the first time she sang in front of the entire Temple Baptist Congregation during a worship service and because the song's message might help "save" her second grade classmates:

Q: [By Mr. Lusk]: Kelly, did you want to share the message of the song, what it means to you, with your classmates?

A: Yes.

Q: Why did you think that was important?

A: Because I might have a chance to help people get saved.

Q: Now, Kelly, I think I know what you mean when you say 'get saved,' but there might be people who read this transcript who don't. So

I'm going to ask you to explain for me what your understanding of that is.

A: Do you mean like, what do you mean by being saved?

Q: . . . What does that mean to you when you use those words?

A: That Jesus comes into your heart and makes it white as snow.

Q: Is it your understanding that unless people are saved they can't go to Heaven?

A: Right.

(Respondents' Appendix, G-3).

Kelly brought the videotape to school on December 13, 1990, and gave it to Ms. Solomon who previewed it (Respondents' Appendix, F-2, ¶¶7-8). Ms. Solomon, after previewing the tape, decided it was not appropriate for her classroom for several reasons. First, the tape had not been approved for showing to her class as required by School District policy (Respondents' Appendix, F-2, ¶12A). Second. she felt that showing a videotape would be inconsistent with the purpose of the VIP program. The program was designed to help develop students' self-confidence by giving them an opportunity to make brief verbal presentations about subjects that were important to them. Slipping a videotape into a VCR would not accomplish that objective because it would not involve speaking before the class (*Id.*, ¶12B). Third, Ms. Solomon was concerned that other students might ask to show videotapes if Kelly were permitted to do so. This would be a time-consuming process — involving previewing the tapes, having them approved by the School District and arranging for videotape equipment to be brought into the classroom — that she wished to

avoid because it cut into instructional time for other subjects (*Id.*, ¶12B). Ms. Solomon was also concerned about the videotape's message. The song's message was the desirability of young children accepting Jesus Christ as their personal savior. The message was entirely consistent with Ms. Solomon's religious beliefs (*Id.*). But, at the same time, she felt it was not appropriate for second graders in a public school classroom. Her students, she felt, would assume that she, as their teacher and a School District representative, endorsed the proselytizing message of Kelly's song (Respondents' Appendix, F-3, ¶12D). Ms. Solomon was also concerned that the song's message might embarrass or offend those of her students who were not Christians, or did not share Kelly's religious beliefs, and distract them from their school work (*Id.*, ¶12E).

Ms. Solomon discussed her concerns about the videotape with McKinley Elementary School Principal, Ms. VanPoperin. Ms. VanPoperin felt that Ms. Solomon's decision not to show the videotape was correct and did not override it (*Id.*, ¶13). Ms. Solomon then pulled Kelly aside and told her that she would not be able to show the videotape to the class (*Id.*, ¶14).

Ms. DeNooyer, advised of Ms. Solomon's decision, undertook to persuade the School District to reverse it. Ms. DeNooyer first met with Ms. VanPoperin. Ms. Van Poperin stood by Ms. Solomon's decision. Ms. DeNooyer then appealed to the School District's Director of Elementary Education and Assistant Superintendent for Instruction, Dr. Gage and Ms. Samples, respectively. They both concurred in Ms. Solomon's decision (Respondents' Appendix, K-1–K-4; L-1–L-2). Their written responses to Ms. DeNooyer reveal their unsuccessful attempts to reach a compromise that would not involve compelling other second grade students to watch a videotape

intended, as Kelly testified, to "save" them. Ms. DeNooyer did not discuss the videotape with the School District's Superintendent, Dr. Merinelli (Respondents' Appendix, J-2), or with any member of the School District's Board of Education (Respondents' Appendix. J-2).

The predictable effect of compelling Kelly's classmates to view the videotape was described in the uncontested Affidavit of Dr. Thomas Berndt. Dr. Berndt is a professor of child psychology at Purdue University (Respondents' Appendix, E-1, ¶¶1-4). Dr. Berndt reviewed Plaintiffs' Complaint, Defendants' Answer and Affirmative Defenses, Kelly's videotape, and the deposition testimony of Kelly and Ms. DeNooyer (*Id.*). It was Dr. Berndt's opinion that, if Kelly's classmates had been required to watch the videotape, they would have concluded that the song's message — the desirability of young children accepting Jesus Christ as their personal savior at an early age — was supported and endorsed by Kelly's teacher, Ms. Solomon, and by the School District (Respondents' Appendix, E-2, ¶8). This conclusion flows from the social cues inherent in this situation. For example, Ms. Solomon would have been present when the videotape was shown, she would have given Kelly permission to show the tape, she would have been involved in playing it, and the tape would have been shown in school during instructional time (Respondents' Appendix, E-3, ¶¶14A-D). Any positive comment Ms. Solomon might have made regarding Kelly's performance, regardless of whether it concerned the song's message, or any comment Kelly might have made about the song would have reinforced their perception that Ms. Solomon and the School District supported and endorsed the song's message (*Id.*, ¶¶14E-F). It was also Dr. Berndt's opinion that showing Kelly's videotape would have disrupted Ms. Solomon's classroom. Second grade students are unable to comprehend that people

may have religious beliefs that differ from their own and are unable to tolerate such differences (Respondents' Appendix, E-4, ¶16). When confronted with differing religious views, they invariably conclude that those holding such views are either dumb or bad (*Id.*, ¶17).

These undisputed facts were presented to the District Court through the parties' cross-motions for summary judgment. The Court first addressed the DeNooyers' First Amendment free expression claim. The Court held that Ms. Solomon's second grade classroom was a "closed forum" in which the School District retained its right to limit student expression for any legitimate educational reason. *DeNooyer by DeNooyer* v. *Livonia Public Schools, et* al., 799 F. Supp. 744, 749 (E.D. Mich. 1992). The Court went on to hold that the School District had several legitimate reasons for not permitting Kelly to show the proselytizing videotape, *Id.*, at 751, and, therefore, the School District had not violated Kelly's right to free expression. *Id.*, at 752.

The District Court also considered the "use versus access" argument that Petitioners raise here. The Court concluded that the argument was "without merit" because it was inconsistent with precedents established by this Court. *Id.*, at 752. The District Court did not address the "viewpoint discrimination" argument Petitioners raise here because that argument was not raised to the District Court.

The District Court did address the equal protection argument to which Petitioners make passing reference. The Court, noting that it had already determined that the School District had not violated the First Amendment, held that no fundamental right was at issue and that Petitioners were not members of any suspect class. *Id.*, at 754. Therefore, the issue of whether the School District's decision not to permit Kelly to show the

videotape while permitting another student to talk about a menorah violated the Equal Protection Clause turned on whether the School District had a rational basis for making such a distinction. *Id.* The Court observed that a rational basis existed between student expression perceived to have the effect of proselytizing elementary students during instructional time as opposed to student expression "about religion" that did not proselytize. The former, noted the Court, raised legitimate concerns about offending other students and their parents and about violating the Establishment Clause not raised by the latter. The District Court also ruled against the Petitioners on their free exercise, free association and liberty interest claims not raised in the Petition. *Id.*, 753-755. Thus, the District Court denied Petitioners' motion for summary judgement, granted the School District's motion and entered Judgment in the School District's favor.

Petitioners filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals' November 18, 1993 Opinion, which remains unpublished, noted the parties' agreement that there were no outstanding issues of material fact. The Court reviewed the undisputed reasons Ms. Solomon had articulated for deciding not to compel the class to watch Kelly's videotape and determined that each articulated reason was "strongly related to a legitimate pedagogical concern." The Court then applied the rule established by this Court's opinion in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), and affirmed the District Court's Judgment. The Court rejected the remainder of Petitioners' arguments on the basis of the District Court's opinion.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE NOT IDENTIFIED ANY LEGITIMATE BASIS FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT THEIR PETITION.

Petitioners have not identified any legitimate reason why this Court should grant their Petition. Petitioners have not specified any important question of law that has not been clearly addressed by this Court's prior opinions. Petitioners have not identified any conflict among the Circuits regarding the issues involved in this case. Nor have Petitioners convincingly demonstrated that the opinion of the District Court or the unpublished opinion of the Court of Appeals is inconsistent with any opinion of this Court.

II.

THE LOWER COURTS CORRECTLY HELD THAT RESPONDENTS HAD NOT VIOLATED PETITIONERS' FIRST AMENDMENT RIGHT TO FREE EXPRESSION BY PROHIBITING THEM FROM COMPELLING SECOND GRADE STUDENTS TO WATCH A PROSELYTIZING VIDEOTAPE IN A PUBLIC SCHOOL CLASSROOM DURING INSTRUCTIONAL TIME.

This Court has traditionally and consistently analyzed governmental action restricting expression according to the forum in which the expression occurred. Three kinds of forums have been recognized: the open forum — such as a public street or public park that has been, by long tradition or governmental fiat, devoted to assembly and debate — in which the government may not regulate expression unless the regulation is necessary to serve a compelling governmental interest; the limited open forum — a place the government has opened to the general public for expressive purposes —

in which, like the open forum, the government may not regulate expression unless the regulation is necessary to serve a compelling governmental interest; and, the closed forum — such as a public school classroom — in which the government retains full authority to regulate expression on any reasonable basis. *Perry Education Association* v. *Perry Local Educators Association*, 460 U.S. 37, 45-46, 103 S. Ct. 948, 954-955, 74 L. Ed. 2d 794 (1983); *Hazelwood School District* v. *Kuhlmeier, supra,* 484 U.S. at 267, 108 S. Ct. at 568; *United States* v. *Kokinda*, 497 U.S. 720, 726-727, 110 S. Ct. 3115, 3119-3120, 111 L. Ed. 2d 571 (1990).

This Court's decision in *Hazelwood, supra,* is directly on point. *Hazelwood* concerned a free expression claim in the public school context in which this Court held that a public school is a closed forum in which student expression may be restricted for any legitimate pedagogical (educational) reason. *Hazelwood* involved a high school principal's decision to censor two articles from a student newspaper that had been written by journalism students. The articles described three high school students' experiences with pregnancy and the impact of divorce on students at the school. The principal, concerned that the pregnant students' identities might be revealed and that the articles' references to sexuality and birth control were simply inappropriate for some of the school's younger students, ordered the articles deleted from the paper. *Id.*, 484 U.S. at 263-264, 108 S. Ct. 565-566. Plaintiffs. the students who had written the articles, sued alleging that the school district and the principal had violated their First Amendment right to free expression.

This Court addressed and rejected plaintiffs' contention that the school newspaper was a forum for public expression. This Court held that it was not and,

further, that a public school was a closed forum unless it had been opened for "indiscriminate use by the general public":

> We deal first with the question whether [the school newspaper] may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions' [citations omitted]. Hence, school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' [citations omitted] or by some segment of the public such as student organizations [citations omitted]. If the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community [citations omitted]. 'The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'
>
> *Id.*, 484 U.S. at 267, 108 S. Ct. at 568 [citations omitted].

This Court then stated that, in the closed forum of a public school classroom, teachers and school district administrators may restrict student expression for any legitimate educational reason:

> Educators are entitled to exercise . . . control over . . . student expression to assure that the participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speakers are not erroneously attributed to the school.
>
> * * *
>
> In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexuality in a high school setting.
>
> * * *
>
> This standard is consistent with our oft expressed view that the education of the nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges [citations omitted]. It is only when the decision to censor a school sponsored publication, theatrical production or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicate[d] [citation omitted], as to require judicial intervention to protect students' constitutional rights.
>
> *Id.*, 484 U.S. at 271-278, 108 S. Ct. at 570-571 [footnote omitted].

Respondents submit that the *Hazelwood* opinion made several clear points important to the proper resolution of this case. First, a public school classroom is

not an open public forum or even a limited public forum regardless of whether students are permitted some latitude about the subjects they may discuss in class. Rather, a public school classroom is a closed forum in which teachers and administrators may restrict student expression so long as the restriction is rationally related to a legitimate educational concern. Second, the age and maturity of the students in the classroom is an important factor that the school district, and the courts, should consider when evaluating the legitimacy of the public school's educational concern. Third, federal courts should be extremely hesitant to interfere with the judgment of local school districts and their administrators, given that education is entrusted to elected state and local officials and not to appointed federal judges.[1]

This Court and the lower courts have indicated that the concept of legitimate educational reasons for restricting student expression is quite open-ended. In *Hazelwood,* this Court observed that making sure the expression is consistent with the objective of the lesson is a legitimate basis for restricting student expression. *Id.*, 484 U.S. at 271, 108 S. Ct. at 570. Speech that might disrupt the classroom or interfere with the rights of other students may also be prohibited, *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 508, 89 S. Ct. 733, 737, 21 L. Ed. 2d 731 (1969), as well as speech that is inappropriate for the students to whom it is addressed due to their level of maturity. *Hazelwood*,

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[1] **The Circuit Courts of Appeals and District Courts have consistently applied *Hazelwood* since it was announced and there are no conflicts among the reported decisions. *See, e.g.*, *Bishop* v. *Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied sub nom.*, *Bishop* v. *Delchamps*, ___ U.S. ___ (1992); *Miles* v. *Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991); *Poling* v. *Murphy*, 872 F.2d 757 (6th Cir. 1989); *Hemry by Hemry* v. *School Board of Colorado Springs*, 760 F. Supp. 856 (D. Colo. 1991).**

supra, 484 U.S. at 271, 108 S. Ct. at 570; *Bethel School District* v. *Fraser*, 478 U.S. 675, 684, 106 S. Ct. 3159, 3165, 92 L. Ed. 2d 549 (1986). Additionally, the Courts of Appeals have made clear what is implicit in *Hazelwood* — that a public school district's concern that student expression might be controversial provides a legitimate basis for restriction. *See, e.g., Planned Parenthood* v. *Clark County School District*, 887 F.2d 935, 945-946 (9th Cir. 1989), *aff'd. en banc*, 941 F.2d 817 (9th Cir. 1991), holding that a school district's concern that plaintiff's advertisement in a school publication promoting birth control might be controversial justified removing the advertisement. Likewise, a school district's concern about violating the Establishment Clause has been held a rational basis for restricting the in-school expression of students' religious views. *Lundberg* v. *West Monona Community School District*, 731 F. Supp. 331, 339 (N.D. Iowa 1989); *Doe* v. *Human*, 725 F. Supp. 1503 (W.D. Ark. 1989), *aff'd.*, 923 F.2d 857 (8th Cir. 1990).

The facts of this case, which Petitioners conceded were undisputed, established clear and compelling educational concerns justifying Ms. Solomon's decision not to require her entire second grade class to watch Kelly's videotape. First, the videotape had not been preapproved, as required by School District policy (Respondents' Appendix, F-3). Second, Ms. Solomon did not think that showing the videotape would accomplish the lesson's objective. The point of the VIP presentations was to enhance students' self-confidence through verbal presentations to classmates. This objective would not be realized if the students simply had the teacher show a videotape to the class (*Id.*; Respondents' Appendix, H-3). Third, Ms. Solomon was concerned about the logistics of showing student videotapes. She would have to preview them, have them approved pursuant to School District policy and arrange to have

viewing equipment in the classroom. This would diminish the amount of instructional time left for other subjects (*Id.*). Fourth, Ms. Solomon was concerned with the effect the videotape would have on her other students. They might assume that she or the School District endorsed or supported the proselytizing message of Kelly's song (Respondents' Appendix, F-3).[2] If so, they could be embarrassed or disturbed by the videotape and it would interfere with their schoolwork, particularly if they did not share Kelly's views (*Id.*). Dr. Berndt's affidavit makes clear that Ms. Solomon's concern on this subject was indeed legitimate (Respondents' Appendix, E-1—E-4).

Applying these uncontested facts to the rule articulated in *Hazelwood,* the District Court held that the School District had several legitimate educational reasons for not requiring Kelly's classmates to watch her videotape:

> [T]he Livonia school authorities have legitimate pedagogical interests in deciding that Kelly DeNooyer should not show her video. The purpose of the VIP program was to teach children oral communication skills. Showing a videotape would circumvent this purpose. The school authorities wanted to avoid encouraging other children to bring in videotapes, because showing them preempts instructional time. The School had a policy of having all videotapes reviewed before classroom use. Moreover, because the show-and-tell was conducted during classroom instructional time, all students were required to attend. The school wanted to avoid a situation where other students and their parents would be

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2 **Ms. Solomon did, in fact, share Kelly's religious beliefs.**

> offended by the religious content of the speech they were required to listen to or would infer the school's endorsement of the speech presented during class. The maturity level of the second grade students was a significant concern.
>
> *DeNooyer, supra*, 799 F. Supp. at 751.

Similarly, the Sixth Circuit, citing *Hazelwood,* held:

> When these principles are applied to the present case, it is clear that Kelly DeNooyer's proposed presentation was part of the class curriculum and was, therefore, school sponsored expression. Because the school had not opened the classroom for use as a public forum, it could regulate both the style and the content of Kelly DeNooyer's presentation, provided its regulation was reasonably related to legitimate pedagogical concerns of the schools.
>
> According to the testimony of Ms. Solomon, her primary 'pedagogical concern' the aim of the 'VIP of the Week' program, was to increase her students' verbal communication skills by requiring a 'live' classroom presentation by the student on some subject of his or her choosing. That concern would be frustrated if every student were permitted to show a videotape of himself or herself doing some activity at another location. Furthermore, the use of a videotape was of concern to Ms. Solomon because it imposed burdens on her as a teacher by forcing her to take time (1) to have the videotape approved by the school district according to its policy (2) to preview the tape herself for classroom suitability, and (3) to arrange for the neeessary replay equipment to be brought to the classroom. These pedagogical concerns apply to

> the 'style' of the presentation, that is, the medium of the videotape itself, regardless of its content. This concern as to the medium of the videotape being sufficient to affirm the district court, it is unnecessary to rule on the other reasons presented by the defendants.
>
> For the reasons stated, we hold that the district court did not err in finding the school's rejection of the showing of the videotape to be reasonably related to legitimate pedagogical concerns, and we AFFIRM the district court's grant of summary judgment as to this issue. As to the other issues raised in this appeal, we AFFIRM the district court's grant of summary judgment for the reasons stated in its memorandum opinion . . . .
>
> (Respondents' Appendix, D-6–D-7).

The reasons stated by the District Court for dismissing Petitioners' First Amendment claim and the reasons articulated by the Sixth Circuit for affirming the District Court are absolutely consistent with the rule and rationale of this Court's decision in *Hazelwood*. Accordingly, this Court should not exercise its discretion to grant the Petition.

III.

THE REASONS PETITIONERS HAVE ADVANCED IN FAVOR OF GRANTING THE PETITION ARE NOT SUPPORTED BY THE DECISIONS OF THIS COURT, OR ANY OTHER, AND ARE INCONSISTENT WITH THIS COURT'S WELL-ESTABLISHED FIRST AMENDMENT JURISPRUDENCE.

Respondents understand Petitioners to assert four reasons for granting their Petition: (1) because the lower courts failed to recognize that forum analysis does not apply to an "insider" seeking to "use" school district

facilities as opposed to an "outsider" seeking "access" to school district facilities; (2) because the lower courts failed to recognize that Ms. Solomon transformed her classroom from a closed forum into a limited open forum by establishing the VIP program; (3) because the lower courts failed to recognize that viewpoint discrimination is unconstitutional even in a closed forum; and, (4) because the lower courts permitted the school district to treat religion differently than other subjects. Respondents will address these reasons in the order presented by Petitioners.

A. Petitioners' Argument That Forum Analysis Does Not Apply To "Use" As Opposed To "Access" Cases Is Inconsistent With The Court's *Hazelwood* Decision And Does Not Provide A Meaningful Basis For Distinguishing Between "Use" And "Access" Cases.

Petitioners maintain that forum analysis, the method this Court applied in cases like *Perry*, *supra*, *Hazelwood*, *supra*, and *Kokinda*, *supra*, does not apply in cases where an "insider" is seeking to "use" school district facilities. Rather, in "use" cases school district authorities may not restrict student expression unless it materially and substantially interferes with the activities or discipline of the school (Petition, p. 6). Forum analysis, contend Petitioners, only applies to cases in which "outsiders" are seeking "access" to school district facilities. This argument is apparently constructed from a passing comment in *Airport Commissioners* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 573, 107 S. Ct. 2568, 2571, 96 L. Ed. 2d 500 (1987),[3] about an issue this Court did not resolve which, in turn, was based on a law review article.

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[3] **Respondents note that Petitioners miscite *Jews for Jesus, supra*, as having been decided in 1990 rather than 1987.**

The dual standards Petitioners would have this Court adopt for persons in public school classrooms, depending on whether they are "insiders" or "outsiders," is not consistent with this Court's decision in *Hazelwood*. The plaintiffs in *Hazelwood* were students in a journalism class who were prohibited by their principal from publishing articles in the school newspa er. Certainly, the *Hazelwood* plaintiffs, like Kelly in this case, were "insiders." Yet, this Court employed forum analysis to reject their First Amendment claim. *Hazelwood* was decided after *Jews for Jesus*. Therefore, there can be no question except that *Jews for Jesus* did not establish a distinction between "use" and "access" cases. *See*, *DeNooyer*, *supra*, 799 F. Supp. at 752.

Petitioners also fail to articulate a meaningful distinction between "insiders" and "outsiders" in the context of an elementary school classroom. The School District believes it has the authority to preclude any "outsider" from intruding into Ms. Solomon's second grade classroom. Thus, the logical result of the distinction Petitioners would have this Court draw between "use" and "access" would eliminate forum analysis in school district cases.

The School District submits that Petitioners have not carefully considered the practical effect of eliminating forum analysis in elementary school classrooms. Elementary teachers do many things besides impart information to their students. They attempt to socialize and encourage them with subtle and, occasionally, not so subtle reminders and reprimands about their behavior, including their expressive behavior. These important tasks would be infinitely more complex, and perhaps not achievable, if elementary teachers were subject to liability for violating the First Amendment every time they restricted their students' immature desires to

express themselves in the absence of "material and substantial interference with the activities or discipline of the school." The School District submits that this result is not required by the First Amendment.

B. Petitioners' Argument That Ms. Solomon Transformed Her Second Grade Classroom From A Closed Forum Into A Limited Open Forum By Initiating The VIP Program Is Not Consistent With *Hazelwood* And Not Supported By Any Opinion Of This Court Or Any Other Court.

In *Hazelwood*, this Court clearly held that public school classrooms were closed forums in which school district administrators and teachers may restrict student expression for any legitimate educational reason. This Court further stated that public school classrooms retained their character as closed forums even if students are permitted to express themselves in class, unless school authorities have "by policy or by practice" opened them for "indiscriminate use by the general public":

> . . . [S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' . . . if the facilities have instead been reserved for other intended purposes, 'communicative or otherwise' then no public forum has been created and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community . . .
>
> *Id.*, 484 U.S. at 267, 108 S. Ct. at 568.

Thus, the mere fact that Ms. Solomon initiated a curriculum related communicative activity in her classroom (i.e., the VIP program) did not transform her classroom from a closed forum into a limited open forum.

The cases string cited by Petitioners do not suggest a different result. Most were decided before *Hazelwood.* Additionally, all of the cases cited by Petitioners are distinguishable because they involved (1) middle or high school aged students (2) engaged in expressive activities that were *not* curriculum related (3) outside of the classroom and, in some cases, off school premises. These are constitutionally significant distinctions, as explicitly recognized by the Courts that authored those opinions. Thus, Petitioners have not identified a single case supporting their position that involved curriculum related speech in a public elementary school classroom.

Petitioners proceed from their flawed premise to the conclusion that, having created a limited open forum, Ms. Solomon was prohibited from restricting student speech based on its content unless the restriction was narrowly drawn to effectuate a compelling governmental interest (Petition, p. 9). Surely, this assertion is not correct. Do Petitioners mean to argue that Ms. Solomon would have been without authority to prohibit one of her students from compelling the rest of the class, during instructional time, to watch a videotape that included nudity, graphic violence, profanity, or acts of wanton cruelty? Conversely, do Petitioners maintain that the government has a "compelling interest" in prohibiting such expression? The School District will not attempt to gage Petitioners' response to these questions. However, it does appear that Petitioners have not carefully considered the ramifications of the rule they would have this Court adopt.

C. Petitioners' Argument That The School District Engaged In Unconstitutional Viewpoint Discrimination Was Not Raised Below And Is Contradicted By The Undisputed Facts Of This Case.

It is well-settled that this Court will not ordinarily consider grounds for reversal that were not raised below. *Taylor* v. *Freckind and Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 1649, 118 L. Ed. 2d 280 (1992). Petitioners did not raise their viewpoint discrimination argument below and, therefore, it should not be considered here.

Beyond the fact that Petitioners did not raise their viewpoint discrimination argument below, the undisputed record establishes that Ms. Solomon did not decide not to compel her entire class to watch Kelly's videotape because she disagreed with the viewpoint expressed in the tape. To the contrary, Ms. Solomon shared Kelly's religious views (Respondents' Appendix, F-2). The undisputed reasons that Ms. Solomon decided not to show the videotape have already been discussed at length. They included her well-founded concern that her young students might misunderstand her, as their teacher and a School District official, to endorse the proselytizing message of Kelly's song and, to that limited extent, were influenced by the videotape's content. However, there is no basis in this record for Petitioners to argue that the videotape was not shown because any person at the School District disagreed with its message.

Related to Petitioners' new found viewpoint discrimination argument are repeated references to the fact that another student was permitted to bring a menorah into the classroom. These references are sprinkled throughout the Petition and tied to the suggestion that the School District favored Judaism at the expense of Christianity or was, in some fashion, hostile to Chris-

tianity. These innuendos are offensive, unfair and not supported by the record.

The School District is located in an overwhelmingly Christian community. Ms. Solomon and all of the named Respondents are Christians. In fact, most students enrolled in the School District do not have the opportunity to meet a Jewish person or learn anything about the Jewish religion. In this context, Amber Cole, perhaps the only Jewish student at McKinley Elementary School, showed her class a menorah as part of a report on the State of Israel (Respondents' Appendix, H-2). Kelly testified that Amber said the following about the menorah: "Well, she said that every day like before Christmas she blew out one of the candles" (Respondents' Appendix, G-2). Thus, Amber, unlike Kelly, did not attempt to proselytize during instructional time with Ms. Solomon's active assistance. Moreover. Ms. Solomon was acting well within her authority by permitting Amber to provide the class with information about an unfamiliar religion as part of a report about a foreign country. Petitioners' contention that this is evidence of anti-Christian bias constitutes unfair and overzealous advocacy.

D. Petitioners' Argument That The School District Must Treat Religion As Any Other Subject Unless Distinctions Are Based On Compelling Governmental Interests Is Inconsistent With This Court's Establishment Clause Jurisprudence.

The Establishment Clause requires the government to be and to appear absolutely neutral with respect to religion. This Court has applied the Establishment Clause with rigorous strictness in public schools due to the immaturity and impressionability of school aged children. *See, e.g., Illinois ex. rel. McCollum* v. *Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948)

(school district policy providing that parents could consent to release students for 30-45 minute weekly period of religious instruction by visiting clergy violates the Establishment Clause); *Engel* v. *Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L, Ed. 2d 601 (1962) (school district policy requiring teachers to begin each day with a non-denominational invocation violates Establishment Clause); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (school district policy requiring readings from Bible or invocations of Lord's Prayer at beginning of day violates Establishment Clause); *Epperson* v. *Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (law prohibiting teaching of theory of evolution violates Establishment Clause); *Stone* v. *Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1981) (law requiring posting of Ten Commandments in classroom violates Establishment Clause); *Wallace* v. *Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (moment of silence law violates Establishment Clause); *Edwards* v. *Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (law requiring teaching of "creation science" if evolution is taught violates Establishment Clause). This Court has even held that the mere *possibility* that a student might misinterpret religious symbolism as a public school's endorsement of a particular religion violates the Establishment Clause. *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373, 397, 105 S. Ct. 3216, 3230, 87 L. Ed. 2d 267 (1985).

Recently, in *Lee* v. *Weisman*, ___ U.S. ___, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), this Court again reinforced the necessity of heightened Establishment Clause scrutiny in the public school context. In deciding that an invocation and benediction performed at a "voluntary" graduation ceremony violated the Establishment Clause, this Court noted:

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools. Our decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. This coercion may not be limited to the context of public schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that a nonbeliever respect their religious practices, in a school context may appear to the nonbeliever to be an attempt to employ the machinery of the state to enforce religious orthodoxy.
>
> *Id.*, ___ U.S. at ___, 112 S. Ct. at 2652.

Petitioners maintain, in the face of these precedents, that the Constitution prohibits public school districts from treating religious speech in the classroom differently from speech on other subjects in the absence of compelling governmental interests. This position would effectively read the Establishment Clause out of the First Amendment and, not surprisingly, Petitioners do not offer any authority on point. To the contrary, the Establishment Clause, as long interpreted by this Court, requires public school districts to treat religion differently than other subjects. Teachers and other school district authorities may, for pedagogical reasons or from sincere conviction, appear to endorse any manner of ideas or ideologies. They may not, however, appear to endorse one religion over another or religion in general. This is the clear and consistent command of this Court. The School District does not need a "compelling governmental interest" to observe the Establishment Clause.

In addition, this record does not support Petitioners' notion that the School District treated religion differently than other subjects. The vast majority of Ms. Solomon's reasons not to show Kelly's videotape had nothing to do with its message, but had to do with the fact that showing a videotape was not consistent with the purpose of the lesson and due to the logistics of showing videotapes in general. The Sixth Circuit held that these factors alone justified Ms. Solomon's decision, irrespective of the videotape's content (Respondents' Appendix, D-6). Thus, the record does not support Petitioners' focus on the religious message in Kelly's videotape.

CONCLUSION

Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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